No. 93-2095

IN THE

Supreme Court of the United States

October Term, 1994

PANAMA CITY MEDICAL DIAGNOSTICS, LTD., DR. FRANK SYFRETT and DR. STEVE TAYLOR,
Petitioners,

v.

GEORGE STUART, in his official capacity as Secretary of Florida Department of Professional Regulation; DOUGLAS COOK, in his official capacity as Director of the Agency for Health Care Administration; and CITIZENS OF THE STATE OF FLORIDA,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
Attorney General

STEPHANIE A. DANIEL
Assistant Attorney General
Counsel of Record for Cook and Stuart

OFFICE OF THE ATTORNEY GENERAL
The Capitol – PL-01
Tallahassee, FL 32399-1050
(904) 488-1573

JACK SHREVE
Public Counsel

STEPHEN M. PRESNELL
Associate Public Counsel
Counsel of Record for Citizens

Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400
(904) 488-9330

Attorneys for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the opinion of the Eleventh Circuit Court of Appeals in *Panama City Medical Diagnostics, Ltd., v. Williams*, 13 F.3d 1541 (11th Cir. 1994), is in conflict with the decision of this Court issued in *Nordlinger v. Hahn*, 505 U.S. ___, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), even though the opinion issued in *Panama City Medical Diagnostics, Ltd.*, favorably cites *Nordlinger*, and does not expressly or impliedly suggest that *Nordlinger* is no longer good law?

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CONSTITUTIONAL PROVISION INVOLVED

Article XIV of the United States Constitution provides, in material part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;...nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 8, 1992, Chapter 92-178, Laws of Florida, became law. This legislation represents one of the more recent efforts of the Florida Legislature over the past two decades, to contain the cost of health care in Florida. *Panama City Medical Diagnostics, Ltd., v. Williams,* 13 F.3d 1541, 1543 (11th Cir. 1994).

In June, 1992, Panama City Medical Diagnostics, Ltd., Dr. Frank Syfrett and Dr. Steve Taylor, Petitioners in the instant proceedings, filed a complaint in the United States District Court for the Northern District of Florida naming various Florida state officials, challenging the constitutionality of Chapter 92-178, Laws of Florida (the Act), and more specifically, Section 16 of that Act (Section 16). *Id.,* at 1544.

Petitioners/Plaintiffs also filed a motion for preliminary injunction before the district court, seeking an order enjoining the enforcement of Section 16, of Chapter 92-178, Laws of Florida. The text of Section 16 is set forth in Petitioners' petition for writ of certiorari. (Pet., p. 3) Basically, Section 16 imposes a fee cap on those charges which may be imposed for designated health care services (i.e., providers of physical therapy, comprehensive rehabilitation therapy, diagnostic imaging, clinical laboratory, and radiation therapy services). Expressly exempted from the fee cap are hospitals and group practices. [Section 16, Chapter 92-178, Laws of Florida, and Section 7(3)(d), Chapter 92-178, Laws of Florida]. By their motion, Plaintiffs asserted that the exemptions to Section 16 lacked a rational basis, and, therefore, violated the Equal Protection Clause of the United States Constitution. *Panama City Medical Diagnostics, Ltd.,* 13 F.3d, 1544.

It should be noted that, Petitioners when describing the legislative intent for Chapter 92-178, Laws of Florida, focus

on "self-referral" concerns. (Pet., pg. 12) However, Petitioners ignore the Legislature's statement, which may be found in Section 7(2), Chapter 92-178, Laws of Florida, that this legislation was intended to, among other things, protect citizens of Florida from unnecessary and costly health care expenditures. § 7(2) Chapter 92-178, Laws of Florida. A review of Chapter 92-178, Laws of Florida, and other related legislation which was passed in this same session (Chapter 92-33, Laws of Florida) reflects that the Florida Legislature was concerned with burgeoning health care costs in Florida, and sought mechanisms and means to control those costs. Section 16, on its face, is such a measure.

A hearing was held on the motion for preliminary injunction, and it was agreed by the parties that the hearing would be final on the equal protection issue. *Id.,* 1544. The only issue presented at that hearing was whether or not the group practice and hospital exemptions violated the Equal Protection Clause of the United States Constitution. Although other issues relating to the constitutionality of Chapter 92-178, Laws of Florida, were raised by the plaintiffs' complaint, these issues were neither addressed by the motion for preliminary injunction nor tried by the District Court to date. (R, Vol. 1, Doc. #1 and 3)

During the course of the hearing before the district court, the Defendants (Respondents herein) presented evidence that the involvement of group practices in diagnostic imaging (the designated health care service provided by the Plaintiffs who were before the District Court) was insignificant. (R, Vol. 6, Doc. #79, pg. 184) Defendants argued that the Legislature conceivably could have believed that exemption of group practices was appropriate, because by and large, the evidence before the Legislature suggested that group practices were not significantly involved in the more expensive (and costly) forms of diagnostic imaging. (R, Vol. 6, Doc. #79, pg. 245) Defendants further argued that the

Legislature might have assumed that group practices, as evidenced by their insignificant involvement in this area, would not be likely to purchase expensive diagnostic imaging equipment. (R, Vol. 6, Doc. #79, pg. 246)

Defendants presented evidence to the District Court that the cost and utilization of designated health care services in Florida, was higher than the national average. *Panama City Medical Diagnostics, Ltd.*, 13 F.3d, at 1543.

Finally, Defendants presented argument to the District Court below that the Florida Legislature could conceivably have believed that, to the extent that an exemption exists for group practices but not for sole practitioners who provide designated health care services, group practices would have a larger patient base from which to recoup the costs of purchasing expensive diagnostic imaging equipment, and, therefore, would be less likely to refer their patients for unnecessary procedures in order to recoup their investments. (R, Vol. 6, Doc. #79, pp. 239-246)

At the conclusion of the hearing on the motion for preliminary injunction, the district court orally announced its intention to grant the motion, and stated:

> ... — in this case, defendants have not convinced this court that there is any rational basis for imposing fee caps on services provided by some entities but not on other competing entities. You know whereof I speak, and our focus for the last eight hours has been on the group practice. And I — I do not, and have not heard, and I do not find that there is any rational basis for imposing these fee caps on some of the medical profession, but not all, or some of the physicians, but not all...

(R, Vol. 6, Doc. #79, pp. 261)

Thereafter, the District Court issued a written order on the motion. The court noted that Section 16 was passed with little discussion. (J.A.-3) The court further stated that:

> In order to decide whether it was rational to exempt group practices and hospitals from the reach of section 16 it must first be determined what objective the legislature had in mind when it enacted the fee cap legislation. Unfortunately, the legislature's cursory treatment of section 16 makes it difficult to discern just what the legislature did intend when it enacted the fee cap....

(J.A.-11)

The District Court found that only three possibilities for rationales were suggested by the record in the case: (1) the fee caps were directed to abuses of joint ventures; (2) the fee cap was passed as a *quid pro quo* for an extension in divestiture dates contained elsewhere in the act; and (3) that the fee caps could have been intended to reduce the cost of designated health services without targeting self-referring physicians in particular. (J.A.-11-13) The court rejected all of these arguments. The District Court made no mention of the other rationales which were propounded by Defendants, as noted above. (J.A.-1-14)

By the order, the District Court Judge found that Section 16 violated the Equal Protection Clause of the United States Constitution, and enjoined Defendants from enforcing the provisions of section 16, Chapter 92-178, Laws of Florida, against the plaintiffs and intervenors in the action.

Defendants took an appeal of the order entered by the District Court Judge. On appeal, the Eleventh Circuit Court of Appeal reversed the order of the district court, and remanded the matter for further proceedings consistent with

the opinion of the Eleventh Circuit Court of Appeals. *Panama City Medical Diagnostics, Ltd.,* 13 F.3d, at 1547.

The Eleventh Circuit Court of Appeals noted that:

> Because legislatures are not required to articulate reasons for the enactment of a statute, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." Therefore, in evaluating the rational basis for a statute, it is entirely permissible to rely on rationales that were not contemplated by the legislature at the time of the statute's passage. (citations omitted, footnotes omitted)

Panama City Medical Diagnostics, Ltd., 13 F.3d, at 1546 [quoting from *Beach Communications, Inc.,* 508 U.S. ___, 124 L.Ed.2d 211, 222, 113 S.Ct. 2096, 2102 (1993)].

The Eleventh Circuit Court of Appeals further noted that the proper inquiry on equal protection review, is concerned with the *existence* of a conceivable rational basis, not whether that basis was actually considered by the legislative body. The Eleventh Circuit further noted that a state has no obligation to produce evidence to sustain the rationality of a statutory classification. *Panama City Medical Diagnostics, Ltd.,* 13 F.3d, at 1547.

The Eleventh Circuit Court of Appeals concluded that there existed a conceivable rational basis for the hospital exemption, due to the fact that Florida hospitals are already subject to cost containment measures. *Id.,* at 1547. The court further concluded that there were several rationales which existed to support the group practice exemption:

> One possible conceivable rational basis is that the legislature chose to exempt group practices because of the insignificant involvement of group

> practices in diagnostic imaging services. Another possibility is that a distinction between group practices and sole practitioners is justified by the assumption that group practices have a larger patient base from which to recoup costs of purchasing expensive diagnostic imaging equipment, and are therefore less likely to need to refer patients for unnecessary procedures to recover their investments. Finally, it is conceivable that the legislature knew the fee caps would drive out of business everyone subject to them, and thus chose to exempt a small group in order to maintain the availability of diagnostic imaging in Florida.

Id., at 1547.

Petitioners seek review of this opinion of the Eleventh Circuit Court of Appeals, by the instant petition for writ of certiorari.

In the statement of the case, Petitioners argue that the fee caps 'would probably' put them out of business. In support of this statement Petitioners cite *Panama City Medical Diagnostics, Ltd. v. Williams,* 13 F.3d 1541, 1544 (11th Cir. 1994). (Pet., pg. 4) The Eleventh Circuit Court of Appeals has only stated that the fee caps **could** put providers of designated health care services out of business. *Id.*, at 1544.

Although Petitioners' complaint filed in the District Court below alleges that the fee caps amount to a regulatory taking, this issue has not yet been litigated. Such an inquiry would require an individualized analysis into the expenses, profits and efficiency of each provider of designated health care services. It cannot now be known whether or not the effect of the fee cap would be to drive all providers out of business. However, the Florida Legislature could have reasonably assumed that the fee cap, as presently established, would drive those entities who were not efficient providers

out of business. *Panama City Medical Diagnostics, Ltd.*, at 1547. The evidence presented to the Florida Legislature established that Florida had more diagnostic imaging machines, in 1989, than the entire nation of Canada, with a population twice that of Florida, and West Germany, with a population five times that of Florida. *Panama City Medical Diagnostics, Ltd.*, at 1543.

SUMMARY OF ARGUMENT

Petitioners have failed to demonstrate that certiorari review is appropriate in this case. Petitioners do not demonstrate that, in *Panama City Medical Diagnostics, Ltd.*, the United States Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court, or other Courts of Appeal. Petitioners do not argue that the question presented is an important question of law which has not been settled by this Court. Instead, Petitioners seek an advisory opinion from this Court as to the impact that two recent decisions of this Court have on equal protection analysis in the area of economic regulation. Certiorari review for this purpose would appear to be inappropriate.

Therefore, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. The Lower Court's Decision, That The Group Practice Exemptions Contained In Section 16, Of Chapter 92-178, Laws Of Florida, Do Not Violate The Equal Protection Clause Of The United States Constitution, Is Consistent With Supreme Court Jurisprudence

Review on a writ of certiorari is a matter of judicial discretion. As a general rule, a petition for writ of certiorari will only be granted where there are special and important reasons therefor. In this regard, this Court has typically considered whether the decision at issue is in conflict with the decision of another court, or with this Court, or whether the decision deals with an important question of federal law

which has not been, but should be, settled by this Court. S.Ct.R. 10.

Petitioners' arguments in support of certiorari review in this case may be grouped in three categories: (1) Petitioners argue that the Eleventh Circuit Court of Appeals erroneously construed this Court's recent opinions on Equal Protection analysis as suggesting that it is improper for a trial court to search for the actual motivation of the challenge; (2) Petitioners argue that the Eleventh Circuit Court of Appeals construed the recent decisions of this Court in *Beach Communications, Inc., supra,* and *Heller v. Doe,* 509 S.Ct. ___, 125 L.Ed.2d 257, 113 S.Ct. 2637 (1993), as modifying the "straightforward equal protection analysis set forth in *Nordlinger, supra,* and thus erred; and (3) Petitioners argue that there exists no rational basis for the exemptions to Section 16. Petitioners' arguments are in error and rest on a misapprehension of this Court's opinions in the *Nordlinger, Heller,* and *Beach Communications, Inc.*, cases, and a misreading of the opinion of the Eleventh Circuit Court of Appeal in *Panama City Medical Diagnostics, Ltd., supra.*

With regard to Petitioners' arguments regarding the importance of the Legislature's actual motivation (Pet., pp. 5-6), Petitioners challenge the conclusion of the Eleventh Circuit Court of Appeals that it was error for the district court to search for the actual motive for Section 16. Petitioners essentially argue that none of this Court's jurisprudence on this issue "in any way suggests that it is improper for a trial court to search for the actual motivation of the challenged statute." (Pet. pg. 6) On this issue, Petitioners are clearly wrong.

In *Beach Communications, Inc.,* this Court stated:

> ...Moreover, because we never require a legislature to articulate its reasons for enacting a statute, *it is entirely irrelevant for constitutional*

> *purposes whether the conceived reason for the challenged distinction actually motivated the legislature. United States Railroad Retirement Bd. v. Fritz,* [449 U.S. 166, 179, 66 L.Ed.2d 368, 378, 101 S.Ct. 453, 461 (1960)]. (emphasis supplied)

Beach Communications, Inc., 508 U.S., ___, 124 L.Ed.2d, at 222, 113 S.Ct., at 2096.

In *Beach Communications, Inc.,* this Court restated a principle which has long been part of this Court's jurisprudence. *See U.S. Railroad Retirement Bd.,* 449 U.S., at 179, 66 L.Ed.2d, at 378, 101 S.Ct., at 461. This Court has consistently taken the position that what actually motivated a legislature to act is irrelevant to any rational basis analysis. *See also Flemming v. Nestor,* 363 S.Ct. 603, 612, 4 L.Ed.2d 1435, 80 S.Ct. 1367 (1960).

In *Panama City Medical Diagnostics, Ltd.,* 13 F.3d, at 1546-1547, the Eleventh Circuit Court of Appeals simply reiterated these existing principles which have been established by this Court. A review of the opinion of this Court in *Nordlinger, supra,* does not suggest that a different conclusion is appropriate. Nowhere in *Nordlinger* does this Court state that actual motives behind Legislation are relevant. Therefore, on the issue of the relevancy of actual motive, there is no conflict between the decision issued by the Eleventh Circuit in *Panama City Medical Diagnostics,* and this Court's jurisprudence on this issue.

It is clear that the District Court did confine its equal protection analysis to actual motivation of the Florida Legislature in passing Section 16, even though Petitioners have suggested that the court looked beyond "actual motivation." (Pet., pp. 10-15) The District Court, in its written order on the issue, stated that to determine whether there was a rational basis for the exemption, it was necessary to

determine "what objective the legislature had in mind when it enacted the fee cap legislation." (J.A.-11)

With regard to Petitioners' second argument, Petitioners argue that the Eleventh Circuit erroneously construed the opinions of this Court in *Beach Communications, Inc.*, and *Heller* as modifying the "straightforward equal protection analysis" set forth in *Nordlinger.* (Pet., pg. 9) Petitioners are in error. Nowhere in *Panama City Medical Diagnostics, Ltd.*, does the Eleventh Circuit Court of Appeals suggest that the Equal Protection Analysis in *Nordlinger* has been modified.

At issue is whether or not the *Beach Communications, Inc.*, and *Heller* decisions impact upon the following statement which may be found in *Nordlinger:* "Nevertheless, this Court's review does require that a purpose may conceivably *or* 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger,* 508 U.S., at ___, 112 S.Ct., at 2332, 120 L.Ed.2d, at 16 (emphasis supplied).

In the opinion issued in *Panama City Medical Diagnostics, Ltd.*, the Eleventh Circuit Court of Appeals does not suggest that this Court has retreated from this statement made in *Nordlinger.* Instead, the Eleventh Circuit noted:

> "The district court erred both in searching for the actual motivation of the legislation, and in confining its analysis to the facts on the record. This focus was in error because, as noted above, whether the hypothetical rational actually motivated the legislature is *irrelevant. The proper inquiry is concerned with the existence of a conceivable basis, not whether that basis was actually considered by the legislative body.*" (emphasis supplied)

Panama City Medical Diagnostics, Ltd., at 1546.

Consistent with *Nordlinger, Beach Communications, Inc.*, and *Heller,* the Eleventh Circuit Court of Appeals appropriately stated that the standard for Equal Protection Analysis in this case was whether there was a conceivable basis for the statute. *Panama City Medical Diagnostics, Ltd.*, at 1547.

The key issue in the case below was not the appropriate standard for equal protection analysis, but rather whether Petitioners sustained their weighty burden of proof in the case below. As noted by the Eleventh Circuit Court of Appeals, "a state 'has no obligation to produce evidence to sustain the rationality of a statutory classification.'" *Id.*, at 1547 (quoting *Heller,* 509 U.S., at ___, 113 S.Ct., at 2643, 235 L.Ed.2d, at 271). The Eleventh Circuit Court of Appeals also noted: "Rather the burden is on the challenger to disprove every conceivable basis which might support the classification, 'whether or not the basis has a foundation in the record.'" *Id.*, at 1547 (quoting *Heller,* 509 U.S., at ___, 113 S.Ct., at 2643, 125 L.Ed.2d, at 271).

The Eleventh Circuit Court of Appeals also noted that:

> ...In regulating economic entities, legislatures are forced to draw distinctions between those that will fall under the regulations, and those that will not. "This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Beach Communications,* ___ U.S. at ___, 113 S.Ct. at 2102.

Id., at 1546.

The opinion of the Eleventh Circuit Court of Appeals in *Panama City Medical Diagnostics, Ltd.*, is completely

consistent with this Court's jurisprudence on Equal Protection analysis.

As a third argument in favor of certiorari review, Petitioners have also argued that there exists no rational basis to support Section 16. (Pet., pp. 10-15) In response, Respondents assert that Petitioners failed to meet their burden of proof below to "negative every conceivable basis for the statute." *Heller, supra.*

In the case below, the district court impermissibly shifted the burden of proof from Plaintiffs to Defendants. The court stated that "defendants have not convinced this court that there is any rational basis for imposing fee caps on services provided by some entities but not on other competing entities." (R, Vol. 6, Doc. #79, pp. 261)

Such a statement is inconsistent with both *Heller* and its predecessors. As noted above, in *Heller* this Court stated that "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," and the state has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.,* 509 U.S., at ___, 113 S.Ct., at 2643, 125 L.Ed.2d, at 271.

This "burden of proof" is not new or novel. *See e.g. Vance v. Bradley, supra,* 440 U.S. 93, 111, 99 S.Ct. 949, 59 L.Ed.2d 171 (1979); and *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973). Further, *Nordlinger* is silent as to "burden of proof" issues. Therefore, Petitioners cannot demonstrate any conflict on this issue between the opinion of the Eleventh Circuit Court of Appeals, and this Court's opinion in *Nordlinger.*

In the instant case, the District Court erred by requiring that Defendants demonstrate that a conceivable rational

basis existed for the statute, rather than requiring Plaintiffs to "negative the existence of any conceivable basis." *Heller,* 509 U.S., at ___, 113 S.Ct., at 2643, 125 L.Ed.2d, at 271. Furthermore, Petitioners failed to negative every conceivable basis for the statute. That it why the decision of the Eleventh Circuit Court of Appeals was unfavorable to Petitioners.

Additionally, it should be noted that Petitioners make misstatements regarding the evidence or argument submitted to the District Court. For example, Petitioners assert that the conclusion of the Eleventh Circuit Court of Appeals, that one possible rational for the fee cap provision might be the insignificant involvement of group practices, was "pure speculation made for the first time on appeal by the Eleventh Circuit,..." (J.A.-11-12) As noted previously, evidence was presented to the District Court that the involvement of group practices in diagnostic imaging was insignificant, and argument was presented that this might have been one reason for the exemption. (R, Vol. 6, Doc. #79, pg. 184, and 245-246)

Petitioners argue that this basis is not rational. Again, Petitioners are in error. First of all, it should be noted that one of the objectives of the Florida Legislature in passing Section 16, of Chapter 92-178, Laws of Florida, was to control health care costs. 7(2), Chapter 92-178, Laws of Florida. Petitioners have ignored this objective in describing the sole purpose of the act as being a desire to "minimize patient self-referral."

Second, it is well established that the Legislature must be allowed leeway to approach a perceived problem incrementally. *Panama City Medical Diagnostics, Ltd.,* 13 F.3d, at 1546. (quoting *Beach Communications, Inc.,* 508 U.S., at ___, 113 S.Ct., at 2102, 124 L.Ed.2d, at 223). *See also Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489,

75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). In the instant case, evidence was presented that group practices were not significantly involved in the area of diagnostic imaging. (see citations above) Absent a perceived problem in that area, the Legislature was free to address the single area before it: designated health care services, excluding hospitals and group practices. The Legislature had no data before it from which it could conclude that there was a problem in either of the two exempted areas.

Although Petitioners assert, as noted above, that the district court went beyond the facts developed in the record below in determining whether the exemptions were rationally based, a review of the record will not support this proposition. Further, Petitioners' own statements contradict this view. Petitioners state that the second purported rational basis for the fee cap provision, that "a distinction between group practices and solo practitioners is justified by the assumption that group practices have a larger patient base from which to recoup the cost of purchasing expensive diagnostic imaging equipment, and are therefore less likely to need to refer patients for unnecessary procedures to recover their investment", is "pure fantasy." (Pet., pp. 12-13) However, in evaluating whether a rational basis exists to support a statute, the court is empowered to "hypothesize" or "speculate" about the objective of the statute. *Malmed v. Thornburgh,* 621 F.2d 565, 569 (3rd Cir. 1980), *cert. denied,* 449 U.S. 955 (1980). A legislative choice is not subject to courtroom fact-finding and may be based on "rational speculation unsupported by evidence or empirical data." *Beach Communications, Inc.,* 508 U.S., at ___, 113 S.Ct., at 2643, 124 L.Ed.2d, at 222. *See also, Vance v. Bradley,* 440 U.S., at 111, 99 S.Ct., at 950, 59 L.Ed.2d 171.

Petitioners have not disproven or negated either the first, second or third basis which was propounded by the Eleventh Circuit Court of Appeals in support of the fee cap statute.

It is for this reason that the Eleventh Circuit Court of Appeals reversed the decision of the District Court. No conflict between the opinion in *Panama City Medical Diagnostics, Ltd.*, and the jurisprudence of this Court, and the decisions of other Courts of Appeal can be demonstrated. Therefore, Certiorari review should be denied.

II. The Petition For Writ Of Certiorari Should Be dismissed Or, In he Alternative, The Decision Below Affirmed Because This Appeal Presents No Substantial Federal Question.

Petitioners do not assert that the issues decided by the Eleventh Circuit Court of Appeal in *Panama City Medical Diagnostics, Ltd.*, are important federal questions which have not been resolved by this Court. This would be difficult to argue in view of the *Heller* and *Beach Communications, Inc.*, cases decided in the 1993 term of this Court. Accordingly, Certiorari review should be denied.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

STEPHANIE A. DANIEL
Assistant Attorney General
Counsel of Record
Florida Bar No. 332305

OFFICE OF THE ATTORNEY GENERAL
The Capitol — PL-01
Tallahassee, FL 32399-1050
(904) 488-1573

JACK SHREVE
Public Counsel

STEPHEN M. PRESNELL
Associate Public Counsel
Florida Bar No. 189884

Office of the Public Counsel
c/op The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400
(904) 488-9330